IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SANDRA LEE,	)	
	)	
Plaintiff,	)	
	)	**Case No. 3:17-cv-0891**
vs.	)	
	)	**Judge Waverly D. Crenshaw**
RUBIN LUBLIN TN, PLLC, BANK OF AMERICA, N.A., and MOONLIGHTERS ENTERPRISES, INC.	)	**Magistrate Judge Alistair Newbern**
	)	
	)	
	)	
Defendants.	)	

BANK OF AMERICA, N.A.'S MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Bank of America, N.A. ("BANA"), submits this Memorandum in Support of its Motion to Dismiss.

FACTS

This action arises out of the 2014 foreclosure sale of property located in Davidson County. Plaintiff Sandra Lee ("Lee" or "Plaintiff") brings three counts against BANA that mirror claims previously adjudicated in an action brought by her co-borrower, William Kantz ("Kantz"). Lee seeks to recover "the fair market value of her residence" [D.E. 1, Ex. A ¶ 83, 98] even though she quitclaimed her interest in the property in 2009. *Id.* ¶ 11. Due to her lack of interest in the foreclosed property, Lee lacks standing to bring this complaint. Additionally, the Complaint fails to state a claim upon which relief can be granted. This Court should immediately dismiss this case with prejudice.

STATEMENT OF FACTS

This is now the fifth case involving the property at 1244 Mary Helen Drive, Nashville, Tennessee (the "Property"). In the first three cases, co-borrower Kantz is also challenging the 2014 foreclosure sale of the Property. *See Kantz v. Rubin Lublin, PLLC*. No. 3:14-cv-01113 (M.D. Tenn.) ("*Kantz I*"); *Fed. Home Loan Mortg. Corp. v. Kantz*, No. 3:15-cv-00932 (M.D. Tenn.) ("*Kantz II*"); *Kantz v. Bank of Am., N.A.*, No. 3:17-cv-00051 (M.D. Tenn.) ("*Kantz III*"). In *Kantz I*, Judge Haynes in a very thorough opinion, ruled against Kantz and held that the foreclosure sale was valid." *Kantz*, 2015 WL 1543531, at *23 (M.D. Tenn. Apr. 6, 2015). Kantz appealed the decision (Case No. 15-5490), and on March 30, 2017, the Sixth Circuit Court of Appeals affirmed the district court's ruling finding that, "The district court had things right: any harm Kantz might have suffered as a result of Rubin's failure to cry the February 2014 sale was cured by giving him exclusive repurchase period and later by re-noticing the sale for August 2014." While *Kantz I* was on appeal, discovery and pretrial deadlines were stayed in *Kantz II* because many of Kantz's "claims are nearly identical to claims considered and rejected by the District Judge in Kantz I." D.E. 212 at 3. At this time, there is a status conference in *Kantz II* set for June 5, 2017. D.E. 229.

This is Lee's second attempt to bring this meritless complaint. In her first attempt, Lee voluntarily dismissed her case after Defendant Rubin Lublin TN, PLLC ("Rubin Lublin") removed the complaint to federal court. *See Sandra Lee v. Rubin Lublin TN, PLLC* No.3:17-cv-500 (M.D. Tenn) ("*Lee I*"). Thereafter, Lee filed an almost identical complaint in state court, but this time adding Moonlighters Enterprises, Inc. ("Moonlighters") in an attempt to defeat diversity. However, Rubin Lublin removed this action, arguing that Moonlighters was fraudulently joined.

This is now Kantz and his attorney's proverbial fifth bite at the apple by bringing identical claims and issues before this Court through the co-borrower Lee for the second time.

On or about December 20, 2007, Lee and Kantz executed a note ("Note") in favor of Bank of America, N.A. D.E. 1, Ex. A ¶ 5. To secure repayment of this loan, Lee and Kantz conveyed the Property via deed of trust to PRLAP, Inc., as trustee for Bank of America, N.A. (the "Deed of Trust"). *Id.*; *see also id.* Ex. A. Lee, much like the allegations in *Kantz I*, *Kantz II*, *Kantz III*, and *Lee I*, contends that no one appeared on behalf of the substitute trustee Rubin Lublin to cry the February 2014 foreclosure sale. *Id.* ¶ 16. The only allegation that does not mirror those in the three prior *Kantz* cases is that BANA failed to provide Lee with notice of acceleration of the Note after a default on the loan. *Id.* ¶ 13. Lee alleges that sometime after execution of the Note and Deed of Trust, she and Kantz parted ways and Lee found other living accommodations. *Id.* ¶ 7. However, not only did Lee move out of the Property, but she also conveyed her interest in the Property to Kantz via quitclaim deed in 2009. *Id.* ¶ 11. After Lee moved out, she alleges that she "contacted Bank of America seeking to be removed from the underlying mortgage." *Id.* ¶ 7. Lee also alleges that she complied with the Note by providing her new mailing address to BANA. *Id.*[1] After defaulting on the loan, Lee claims BANA notified Kantz it was accelerating the loan but chose not to send her a 'notice of acceleration,' a 'notice of default,' or any other notices related to the Note. *Id.* ¶ 13.

The facts concerning the foreclosure sale, scheduled for February 20, 2014, are where this case becomes one and the same with *Kantz I*, *II,* and *III*. As Judge Haynes stated in *Kantz I*, the case "arises out of Plaintiff's allegations that on February 20, 2014, at the Davidson County

[1] In her complaint in *Lee I*, Lee alleged that BANA was aware of her physical, mailing, and email address, and her telephone number due a separate deposit account she also maintained with BANA. BANA pointed out in its motion to dismiss the complaint that the Note required Lee provide written notice of a new address. Now, conveniently, Lee alleges that she complied with the Note and provided written notice.

courthouse, no one on behalf of Defendant Rubin Lublin appeared at the foreclosure sale of Plaintiff's property to cry the sale of the property and that a sale of the property did not occur." 2015 WL 1543531, at *1. Lee sets forth the same allegations here. *See* D.E. 1 ¶¶ 13-70. In fact, this complaint is nearly identical to the operative complaint in *Kantz I* and the operative counterclaim in *Kantz II*. In short, Lee alleges that Kantz appeared at the Davidson County Courthouse on February 20, 2014, but that nobody ever showed up on behalf of Rubin Lublin, the Substitute Trustee, to conduct the sale. D.E. 1 Ex. A. ¶¶ 19- 21. After the scheduled time of the sale, "FYI, a junior lienholder, made inquiries to Rubin Lublin about why no one appeared and the sale was not cried." *Id.* ¶ 24. Bret Chaness, an attorney at Rubin Lublin responded via email, advising that "I've been assured that the sale was indeed cried." *Id.* at ¶ 25. Without any facts to support such an assertion, Lee claims that "Mr. Chaness knew or should have known the sale had not been cried when he intentionally made this materially false statement." *Id.* at ¶ 28. Rubin Lublin then executed and recorded a Substitute Trustee's Deed, memorializing the February 20, 2014 sale, and conveying the Property to the Federal Home Loan Mortgage Corporation ("Freddie Mac") for $398,126.15. *Id.* ¶¶ 29, 35.

Kantz I was filed on March 25, 2014, and removed to this Court on May 6, 2014. In an attempt to bring that case to a resolution, Judge Haynes stayed the case for 60 days following the case management conference on June 27, 2014. He allowed Kantz "thirty (30) days to arrange the repurchase of the subject property; if Plaintiff does not do so, Defendants will then have an additional thirty (30) days to arrange notice and sale of the property. Parties will then file additional briefing addressing the mootness of certain claims." *Id. ¶* 48. Freddie Mac, the owner of the Property and the promissory note underlying the Deed of Trust, gave Kantz an opportunity to satisfy the indebtedness underlying the subject deed of trust in full in exchange for a reconveyance of the Property. *See Kantz I* at D.E. 61-1 ¶ 51. Kantz did not pay this amount and Rubin Lublin, as substitute trustee, held another properly advertised foreclosure sale on August 26, 2014. *See id.* at D.E. 43. The results of the February 20 and August 26 sales were exactly the same – the Property was sold to Freddie Mac for $398,126.15. Both Freddie Mac and Rubin Lublin then filed motions to dismiss the case as moot, arguing that if the February 20 sale was invalid, any deficiencies in that sale were cured by the August 26 sale, and that if the February 20 sale was valid, the August 26 sale was a harmless nullity. *See id.* at D.E. 48, 50. Judge Haynes agreed, and dismissed the case on April 6, 2015. *See* 2015 WL 1543531. Judge Haynes' judgment was subsequently affirmed by the Sixth Circuit Court of Appeals.

Despite this finding, Lee raises a number of confusing and disjointed allegations that challenge the propriety of the August 26, 2014 sale that was previously ordered by this Court and later affirmed by the Sixth Circuit Court of Appeals. As best as can be discerned from the complaint, Lee makes the same assertions Kantz makes in *Kantz II* – that the August sale is void because the February sale was valid but the February sale is invalid because Rubin Lublin failed to properly cry the sale. *See* D.E. 1 Ex. A ¶¶ 44, 46, 50, 60-62. Specifically, Lee claims that the August sale could not have been properly held because the February sale extinguished the Deed of Trust and the authority of the Substitute Trustee to act under it. *Id.* ¶ 50. It also appears that Lee is contending that Bank of America, N.A. could not have held the sale as the holder of the promissory note because Freddie Mac was the owner of the note. *See id.* ¶¶ 45-47, 53, 56, 58.

Based on these allegations, Lee sets forth three counts: 1) fraud, constructive fraud, and civil conversion; 2) breach of contract and wrongful foreclosure; and 3) conspiracy. Although she had no interest in the Property on the date of the foreclosure sale, Lee is attempting to recover over $250,000.00 in compensatory damages. However, one cannot be compensated for losing something one never had to begin with. Lee lacks standing to bring this lawsuit and has failed to state a claim upon which relief can be granted.

ARGUMENT AND CITATION OF AUTHORITY

A. STANDARD FOR DISMISSAL

1. Rule 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) can take two forms – a facial attack and factual attack. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction" while a "factual attack challenges the factual existence of subject matter jurisdiction" and "a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists . . . ." *Id.* The "Plaintiff bears the burden of establishing that subject matter jurisdiction exists." *Id.* (citing *DLX, Inc. v. Commonwealth of Ky.*, 381 F.3d 511, 516 (6th Cir. 2004)); *see also Johnston v. Geise*, 88 F. Supp. 3d 833, 837 (M.D. Tenn. 2015).

2. Rule 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. To survive a Rule 12(b)(6) motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and emphasis omitted). Under Rule 12(b)(6), the complaint is viewed in the light most favorable to plaintiffs, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of plaintiffs. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

A "legal conclusion couched as a factual allegation," however, need not be accepted as true. *Twombly*, 550 U.S. at 555. The plaintiffs' obligation to provide the "grounds" for their claimed entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). "[T]hat a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In short, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (internal quotation marks and citation omitted).

B. LEE CONVEYED HER INTEREST IN THE PROPERTY TO KANTZ, AND THEREFORE, LACKS CONSTITUTIONAL STANDING

"A party seeking to invoke the court's subject matter jurisdiction must establish the necessary standing to sue before the court may consider the merits of that party's cause of action." *Johnston*, 88 F. Supp. 3d at 840. In order to establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citations omitted). Lee cannot satisfy any of the three elements.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* "A 'concrete' injury must be '*de facto*'; that is, it must actually exist. *Id.* As at least one other federal court has recognized, a plaintiff who signed a promissory note and deed of trust is stripped of Article III standing to challenge a foreclosure sale if that plaintiff conveyed their interest in the property prior to the foreclosure. *See Matulka v. M & T Bank*, No. 8:12CV236, 2013 WL 991668, at *3 (D. Neb. Mar. 12, 2013).

Here, Lee conveyed her interest in the Property to Kantz over four years before the foreclosure sale. As such, Lee cannot claim that she suffered any injury as a result of a foreclosure. The entire complaint centers on damages from the loss of the Property at foreclosure [D.E. 1 Ex. A ¶¶ 79, 98], Lee's demand for actual damages in the amount of the "the fair market value of her residence," [*id.* ¶ 83], and the "return of the residence." *Id.* ¶ 74. In short, she claims that her injury is a loss of the Property. This alleged injury belongs only to those with an interest in the Property, and Lee is not one of those. *See Matulka*, 2013 WL 991668, at *3. And because Lee had no interest in the Property at the time of the foreclosure sale, there is no redressable injury, as a rescission of the sale would not place Lee back in title, and an award of "the fair market value of her residence" is impossible, since there is no "residence" or other property belonging to Lee at issue in this case. *See, e.g., id.* Accordingly, Lee lacks Article III standing and this entire case should be dismissed under Rule 12(b)(1).

C. NOTICE TO KANTZ IS NOTICE TO LEE

In Lee's complaint, she alleges that BANA's failure to provide her with an acceleration notice caused her damages. In her count for fraud, Lee alleges BANA fraudulently failed to comply with the Deed of Trust's notice requirements by failing to send notice to all "obligators." D.E. 1 Ex. A ¶ 81. In her breach of contract and wrongful foreclosure claim, Lee claims BANA breached the Deed of Trust by failing to give notice of the Note's default, of the Note's acceleration, and of the pending foreclosure sales. *Id.* ¶ 87. Lastly, in Lee's conspiracy count, she alleges BANA conspired to not advise her of "any details of the default, acceleration, and sales, and then recorded documents affecting her ownership in the Property." *Id.* 105. However, these allegations claiming BANA failed to provide notice pursuant to the Deed of Trust are undermined by the Deed of Trust itself.[2]

Paragraph 15 of the Deed of Trust states, "Notice of any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender . . . *There may be only one designated notice address under this Security Instrument at any one time*." *Id.* Ex. A (emphasis added). The Deed of Trust continues to proscribe the procedure for a borrower to change the designated notice address. *Id.* Lee acknowledges that Kantz received the notice of acceleration but claims BANA failed to provide her with the same notice. (*Id.* ¶ 13). However, according to the Deed of Trust, notice to Kantz was notice to Lee. Pursuant to the Deed of Trust, BANA was not required to send a separate acceleration notice to Lee at her separate address. Accordingly, Lee's claims premised on these allegations fail.

D. FRAUD, CONSTRUCTIVE FRAUD, AND CIVIL CONVERSION

Even if Lee were able to demonstrate that she has Article III standing, she still fails to state a claim upon which relief can be granted. In Count I, Lee contends that BANA committed intentional and willful fraud by failing to comply with the Deed of Trust's notice requirements and by making post-sale misrepresentations about whether the sale actually took place. D.E. 1-1 ¶¶ 63, 68. Lee's fraud count fails because it is not independent of her breach of contract claim and Lee could not have lost the property at a foreclosure sale by reasonably relying upon post sale representations. Further, any claim of fraud as to the February 2014 foreclosure sale is barred by the statute of limitations.

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[2] If inconsistent with the allegations of the complaint, the exhibit controls. *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union*, 221 F.2d 644, 647 (6th Cir. 1955).

I. Fraud and Constructive Fraud

"Actions for fraud contain four elements: (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform." *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992) (citing *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.E.2d 25, 29 (Tenn. Ct. App. 1992)). The circumstances constituting a claim for fraud must be pleaded with particularity pursuant to Fed. R. Civ. P. 9(b). "[T]o satisfy Rule 9(b), a plaintiff must (1) specify the time, place, and content of the alleged misrepresentation, (2) identify the fraudulent scheme and the fraudulent intent of the defendant, and (3) describe the injury resulting from the fraud." *Thompson*, 773 F.3d at 751 (citing *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.,* 532 F.3d 496, 504 (6th Cir. 2008)).

Here, Lee's fraud claim based upon BANA's failure to comply with the Deed of Trust's notice requirements fails because Lee is attempting to convert a breach of contract claim into a fraud claim. In fact, Count II for breach of contract is based on the exact same allegations, and "it is axiomatic that the plaintiff cannot assert two separate counts alleging the exact same claims." *Compare D.E. 1, Ex. A.* at ¶ 81 *with id.* at ¶ 87. "Conduct constituting breach of contract becomes tortious only when it also violates a duty, independent of the contract, arising from wider principles of social responsibility." *Thomas & Assocs., Inc. v. Metro. Govt. of Nashville*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at *6 (Tenn. Ct. App. June 6, 2003) (citations omitted). No such duty exists here. "Tennessee law does not impose common law duties on financial institutions with respect to their customers, depositors, or borrowers." *Silvestro v. Bank of Am., N.A.*, No. 3-13-0066, 2013 WL 1149301, at *4 (M.D. Tenn. March 19, 2013) (citing *Permobil, Inc. v. American Exp. Travel Relates Services Co., Inc.*, 571 F. Supp. 2d 825, 842 (M.D. Tenn. 2008); *Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 932 (6th Cir. 2006)). Thus, BANA did not owe Lee any duties outside of the terms of the Deed of Trust and any alleged violation of these terms cannot constitute a tort as a matter of law.

Further, it is not possible for BANA's alleged post-sale misrepresentations to cause Lee's injury. Lee alleges BANA's fraudulent conduct allowed her property to be sold at a foreclosure sale. However, at the same time, Lee alleges that BANA made post-sale misrepresentations, about whether the sale took place. D.E. 1, Ex. A. ¶ 81. A fraud claim must allege an injury caused by reasonable reliance on the representation. *Dobbs*, 846 S.W.2d at 274. Lee's reliance upon a statement that took place after the foreclosure sale and that was not made to her could not have caused her to lose her property at the foreclosure sale. Count I should be dismissed.

Lastly, Lee fails to plead any facts – let alone with particularity – that show BANA defrauded her. Initially, Lee does not show the existence of an intentional misrepresentation *made directly to her*. Her allegations either concern statements within a recorded deed or Lee fails to state to whom the misrepresentation was made. *See* D.E. 1-1 ¶¶ 81. Only under limited circumstances can a plaintiff prevail on a fraud claim for statements made to third parties.

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Davis v. McGuigan, 325 S.W.3d 149, 159 (Tenn. 2010).

Here, there are absolutely no allegations that BANA made any misrepresentations directly to Lee with any intention or expectation that it would influence Lee's conduct in the foreclosure sale. This is especially true because Lee had no interest in the Property so it is entirely implausible that such an intention or expectation would be present here.

There are also no factual allegations of damages – another necessary element – only a conclusory request for damages is "in the amount of the fair market value of her residence." D.E. 1, Ex. A, ¶ 83. This is both insufficient under Rule 9(b) and factually impossible because Lee cannot claim damages based on the value of lost property that she did not own. In the absence of any allegations, pleaded with particularity, that show that a fraud was perpetrated on her, Lee cannot state a fraud claim and Count I must be dismissed.

Lastly, Lee's claims related to the February 2014 sale are barred by the three year statute of limitation. In Tennessee, the statute of limitations for common law fraud is three years, Tenn. Code Ann. § 28-3-105, and such a cause of action accrues "when a plaintiff discovers, or in the exercise of reasonable care and diligence, should have discovered, his injury and the cause thereof." *City State Bank v. Dean Witter Reynolds, Inc.*, 948 S.W.2d 729, 735 (Tenn. Ct. App. 1996); *CMH Mfg. v. US GreenFiber, LLC*, No. 3:12-273, 2013 U.S. Dist. LEXIS 91914, at *11 (E.D. Tenn. July 1, 2013) (summarily dismissing fraud claims over three years old). Here, any allegations of fraud related to the February 20, 2014 foreclosure sale are barred by the statute of limitations because Lee did not file this complaint until May 5, 2017. For all the reasons stated above, this count must be dismissed with prejudice.

II. Conversion

The elements of a conversion claim include: (1) an appropriation of another's tangible property to one's use and benefit; (2) an intentional exercise of dominion over the chattel alleged to have been converted; and (3) defiance of the true owner's rights to the chattel. *White v. Empire Express, Inc.*, 395 S.W.3d 696, 720 (Tenn. Ct. App. 2012) (citing *River Park Hosp., Inc. v. Blue Cross Blue Shield of Tenn., Inc***.**, 173 S.W.3d 43, 60 (Tenn. Ct. App. 2002)). Lee's conversion count fails because she did not have an ownership interest in the Property when the Property was sold at the foreclosure sale in 2014. Accordingly, this count must be dismissed with prejudice.

E. BREACH OF CONTRACT AND WRONGFUL FORECLOSURE

In Count II, Lee asserts that BANA wrongfully foreclosed because it breached the terms of the Deed of Trust itself and through its agents "by failing to comply with the Deed of Trust's clear and exact post-invocation of the deed's 'power of sale' provisions." D.E. 1 Ex. A ¶ 87.

> These violations at the February 20, 2016 [*sic*] and August 26, 2014 foreclosure sales, include but are not limited to, failure to give notice of the Note's default, failure to give notice of the Note's acceleration, and failure to give notice of the pending foreclosure sale, non-existent and/or improper crying of the sale, post-February sale refusal to identify the true Note holder, and post-sale misrepresentation concerning the sale. Ms. Lee was further denied her rights under the Deed of Trust's ¶¶ 19 & 22 which grants her the right to 'cure defaults' and 'reinstate' the Note after acceleration.

Id.

"The essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." *Ingram v. Cendant Mobility Fin. Corp.*, 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006) (citations omitted). Lee has failed to plead the requisite elements, especially damages.

As explained above, Lee cannot claim any damages. Without any factual allegations concerning how she has been damaged, Lee "requests actual damages of $250,000.00 due to the loss of her interest in the property, the failure to sell the property at fair market value causing an unnecessary deficiency balance on her BOA note, and creating an unsecured second mortgage with

First Tennessee Bank . . . punitive damages, return of her residence if possible, and reasonable attorney's fees and costs as permitted under Tennessee law." D.E ¶ 98. These are simply conclusory allegations, devoid of any proper factual enhancement in line with *Twombly* and *Iqbal*, and therefore Lee has failed to state a claim. However, Lee is completely unable to show the existence of damages because she had no interest in the Property at the time of the foreclosure sale.

> The purpose of assessing damages in a breach of contract suit is to place the plaintiff, as nearly as possible, in the same position he would have been in had the contract been performed. However, it is well settled law that the injured party is not to be put in a better position by recovery of damages for breach of contract than he would have been in if the contract had been fully performed.

Kantz I, 2015 WL 1543531, at *23 (quoting *Action Ads, Inc. v. William B. Tanner Co., Inc.*, 592 S.W.2d 572, 575 (Tenn. Ct. App. 1979)).

Lee lost nothing by the foreclosure sale because she had no interest in the Property, and therefore, any award of damages for breach of contract or wrongful foreclosure would put her in a better position than she was in previously, in direct contravention of Tennessee law. This is especially true because Lee is claiming "return of her residence" as part of her damages. Lee has not suffered any damages, and therefore she fails to state a claim for breach of contract. Count II should be dismissed.

F. LEE FAILS TO STATE A CLAIM FOR A CONSPIRACY

The final count in the complaint is for conspiracy. D.E. 1, Ex. A ¶¶ 99-111. "An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff. Upon a finding of conspiracy, each conspirator is liable for the damages resulting from the wrongful acts of all co-conspirators in carrying out the common scheme." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71

S.W.3d 691, 703 (Tenn. 2002) (internal citations omitted) (citation omitted). However, "a civil conspiracy is not legally possible where a corporation and its alleged co-conspirators are not separate entities, but instead stand in a principal-agent relationship." *Id.* (citing 16 Am. Jur. 2d *Conspiracy* § 56 (1998)). Additionally, a conspiracy requires a finding of liability for an underlying tort as a conspiracy claim cannot stand alone. *Kantz I*, 2015 WL 1543531, at *20 (citing *Lane v. Becker*, 334 S.W.3d 756, 764 (Tenn. Ct. App. 2010)). Claims of conspiracy must be pleaded with particularity pursuant to Rule 9(b). *Hagen v. U-Haul Co. of Tenn.*, 613 F. Supp. 2d 986, 996-97 (W.D. Tenn. 2009); *see also Lane v. Becker*, 334 S.W.3d 756, 763 (Tenn. Ct. App. 2010) ("Conspiracy claims must be pled with some degree of specificity.").

Here, Lee alleges in conclusory fashion that Rubin Lublin and Moonlighters were separate entities operating on a contract basis. D.E. 1, ¶ 101. Once again, Lee has changed her story from her complaint in *Lee I* in order to try to avoid dismissal. In *Lee I*, Lee admitted that Rubin Lublin was acting as an agent for Bank of America, [*Lee I* D.E. 1-1 ¶¶ 74, 83, 85], and BANA argued in its motion to dismiss that "a civil conspiracy is not legally possible where a corporation and its alleged co-conspirators are not separate entities, but instead stand in a principal-agent relationship." *Trau-Med of Am*, 71 S.W. 3d at 703. Now, of course, Lee alleges in this count that Rubin Lublin is not an agent even though she contradicts herself by alleging in Count II that Rubin Lublin and Moonlighters were BANA's agents. D.E. 1 Ex. A ¶ 87. However, Lee's attempt to characterize Rubin Lublin and Moonlighters as independent entities solely to allege a conspiracy claim fails because as substitute trustee Rubin Lublin was BANA's agent. *See Shields v. HSBC Bank USA, Nat'l Ass'n*, No. 13-2955-STA-dkv, 2014 U.S. Dist. LEXIS 44351, at *13 (W.D. Tenn. Mar. 7, 2014) ("Rubin Lublin's role was simply that of a substitute trustee, an agent for HSBC Bank Trustee, and therefore he cannot be considered a separate party to any enterprise."); *Dillard* *v. Bank of Am., N.A.*, No. 13-2253-JDT-dkv, 2013 U.S. Dist. LEXIS 123604, at *29 (W.D. Tenn. Aug. 1, 2013) ("BNYM appointed Rubin as substitute trustee . . . As such, Rubin was an employee or agent of BNYM.").

Additionally, all of Lee's underlying tort claims against BANA fail as a matter of law so there can be no conspiracy standing alone. *Kantz I*, 2015 WL 1543531, at *20. Lastly, the conspiracy claim fails because it only concerns the February 2014 foreclosure sale which this Court and the Sixth Circuit Court of Appeals have already determined that the August 2014 sale cured any harm caused by the February 2014. Thus, Lee has failed to state a claim for a conspiracy and Count III should be dismissed.

CONCLUSION

Based on the foregoing, Bank of America, N.A. respectfully requests that this Court grant its Motion to Dismiss with prejudice.

Respectfully submitted this 1st day of June, 2017.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2017, a copy of the foregoing was filed electronically with the Clerk's office by using the CM/ECF system and served electronically and/or via first-class U.S. mail, postage prepaid, upon all counsel as indicated below. Parties may also access this filing through the Court's ECF system.

James D. R. Roberts, Jr.
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